

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No.438-DB of 2005
Date of Decision: November 06, 2006

Pritam Singh son of Suba Singh, resident of Village Matkanian

.....Appellant

VERSUS

The State of Punjab

.....Respondent

Criminal Appeal No.812-SB of 2005

Jagtar Singh son of Mohinder Singh, Driver, resident of Village Kharkara

.....Appellant

VERSUS

The State of Punjab

.....Respondent

CORAM:- HON'BLE MR.JUSTICE K S GAREWAL
HON'BLE MR.JUSTICE R S MADAN

PRESENT: Mr.KS Dhaliwal,Advocate
for the appellants.

Mr.AS Virk, Additional Advocate General, Punjab.

R S MADAN, J.

By this order, we propose to dispose of two Criminal Appeals bearing No.438-DB of 2005 and 812-SB of 2005 which have arisen out of the common judgment dated 5-4-2005 rendered by Mr.Virender Kumar, Judge, Special Court, Sangrur whereby he convicted accused-Pritam Singh under Section 15 of the Narcotic Drugs and Psychotropic Substances Act and accused-Jagtar Singh was convicted under Section 25 of the Narcotic Drugs and Psychotropic Substances Act. Accused-Pritam Singh was sentenced to undergo rigorous imprisonment for twelve years and to pay a fine of Rs.1 lakh, in default of payment of fine, he was further ordered to undergo rigorous imprisonment for two years. Accused Jagtar Singh was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1 lakh, in default of payment of fine, he was further ordered to undergo rigorous imprisonment for two years.

In brief, the facts of the prosecution case which are taken out from the judgment of the trial Court are reproduced as under:

"As per the prosecution, on 15-7-2000, a police party headed by SHO Parshotam Singh, was holding a nakabandi at the bridge canal minor in the area of V.Balian. A truck bearing No.HR-12/0396 was noticed by the police party coming from the side of V.Bhalwan which was signaled to stop. Accused Pritam Singh was apprehended at the spot, whereas the other four persons escaped. They were unsuccessfully chased by the police party. During his interrogation, apprehended accused, disclosed his name as Pritam Singh son of Suba Singh

resident of Matkanian. The SHO told him that he suspected some contraband in his truck and wanted to conduct the search of his truck and SHO apprised the accused of his right to be searched in the presence of a Magistrate or some Gazetted Officer, whereupon he desired to be searched in the presence of some Gazetted Officer. His consent memo was prepared, signed by him and attested by the witnesses. Thereupon SHO called ASP RK Jaiswal over wireless, who reached there shortly. The ASP disclosed his identity to the accused that he was a Gazetted Officer and posted as ASP Sangrur. The ASP also apprised the accused of his right to be searched in the presence of some Magistrate or other Gazetted Officer, but he reposed faith over the ASP and offered to be searched in the presence of ASP himself. His consent memo was again prepared which was signed by accused and attested by the witnesses and ASP himself. During the search of the truck No.HR-12-0396, in the presence of ASP, 22 bags containing poppy husk were recovered from the cabin. Two samples each weighing 250gms. were separated out of each bag and made into parcels. The remaining poppy husk which weighed 29-/2kg. Including gunny bag in each bag, was put into the same bags and made into parcels. The sample parcels as well as the bags containing remaining poppy husk, were sealed by the SHO with his seal bearing impression PS. The ASP also put his own seal bearing impression PK on the sample parcels and parcels containing remaining poppy husk and also on the seal sample. The case property was taken into possession vide a recovery memo which was attested by the

witnesses. Seal was handed over by the Investigating Officer, to ASI Joginder Singh. The truck No.HR-12-0396 was also taken into possession alongwith the case property. On personal search of accused Rs.120/- were recovered which were also taken into possession vide a personal search memo which was also attested by the witnesses. On further search of truck of accused, driving licence of Hoshiar Singh accused, permit, Insurance policy and a copy of DDR of case No.112/99, P.P.Ramthali were recovered, which were also taken into possession vide a memo attested by the witnesses. Statement of witnesses were recorded, site plan was prepared and a ruqa was sent to the police station. The arrest memo and memo regarding grounds of arrest of accused Pritam Singh, were also prepared and accused Pritam Singh was arrested at the spot. On return to police station the case property was deposited intact. In due course, the other accused, namely, Angrej Singh, Ajaib Singh, Jagtar Singh, Hoshiar Singh @ Hoshiar Lal and Hari Singh were arrested by the Investigating Officer on 23-7-2000, 23-7-2000, 18-10-2000, 15-7-2001 and 30-9-2002 respectively and the challan was presented in the Court. Accused Hoshiar Singh was declared as proclaimed offender but was arrested during the pendency of trial and against him, supplementary challan was presented in the Court on 30-7-2001."

On appearance of the accused before the Court of the Special Judge, Sangrur and finding a prima facie case, accused-Pritam Singh was charged under Section 15 of the Narcotic Drugs and Psychotropic Substances Act whereas accused Jagtar Singh was charged for the

commission of offence under Section 25 of the Narcotic Drugs and Psychotropic Substances Act. The said charges were read over and explained to the accused, to which they pleaded not guilty and claimed trial.

It is pertinent to mention here that the learned Judge, Special Court, Sangrur has convicted the two accused, namely, Pritam Singh and Jagtar Singh and acquitted the other accused, namely, Angrej Singh, Ajaib Singh, Hoshiar Singh and Hari Singh from the charges framed against them.

To prove its case, the prosecution has examined 11 PWs. i.e. PW1-Parshotam Singh, SHO; PW2-ASI Sat Parkash; PW3-HC Jagmohan Singh; PW4-SI Sukhminder Singh; PW5-ASI Joginder Singh; PW6-ASI Surinder Kumar; PW7-RK Jaiswal, then working as ASP, SSP, Moga; PW8-Amarjit Kumar, Civil Nazar; PW9-ASI Om Parkash of Police Lines, Kaithal, ASI; PW10-Binderpal Singla, Insurance Agent and PW11-ASI Balbir Chand has partly investigated the case.

After the evidence of the prosecution was closed, the accused were examined in terms of Section 313 of the Code of Criminal Procedure in which the entire incriminating evidence was put to them, to which they denied and pleaded innocence and false implication in the case. They pleaded party faction to be the motive behind their false implication.

In defence, the accused examined DW1-Harnek Singh; DW2-Kartar Singh, Ex-member Panchayat of Village Ghorenab and DW3-Jarnail Singh, Ex.-Serviceman and a neighbourer of accused Hari Singh.

After going through the evidence of the prosecution and the defence, the learned Judge, Special Court, Sangrur recorded the findings

of conviction and sentence against accused Pritam Singh and Jagtar Singh as mentioned in the earlier part of the judgment.

We have heard the learned counsel for the parties and have carefully gone through the evidence and the other materials brought on the record.

Learned counsel for the appellants has raised two fold arguments to challenge the order of conviction recorded by the learned trial Court against the present appellants, which read as under:

(1)that the prosecution has failed to prove Jagtar Singh as owner of the truck bearing No.HR-12-0396 from where the contraband of poppy husk was recovered by the police.

(2)that Pritam Singh-accused has been falsely implicated in this case due to party faction in the Village.

In support of his submissions, the learned counsel has contended that so far as accused-Jagtar Singh is concerned, the prosecution has examined PW9 ASI Om Parkash and PW10-Binder Singla, agent of Insurance Company, to prove that truck No.HR-12-0396 was owned by Jagtar Singh-accused. PW9-ASI Om Parkash, who had earlier challaned Jagtar Singh in case bearing FIR No.112 of 18-7-1999 under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, wherein the documents of truck No.HR-12-0396 were alleged to have been taken into possession by the Police vide a memo prepared in that case, it was simply stated that the truck No.HR-12-0396 was owned by accused-Jagtar Singh. PW10-Binder Pal Singla, LIC Agent, stated that driver of truck No. HR-12-0396 had secured the policy in the name of the owner of the truck.

He had categorically admitted that the vehicle in question was not got insured by the owner of the truck. It was open for the prosecution, who summoned the record of the case bearing FIR No.112 of 18-7-1999, pending against Jagtar Singh wherein the registered cover was stated to have been taken into possession, to prove the ownership. Neither Jagtar Singh was summoned nor any person from the Registration Authority was examined to prove his ownership. It is also not proved on the record that if truck No.HR-12-0396 was seized in the earlier criminal case titled “State of Punjab Vs. Jagtar Singh”, how the truck was being plied by Pritam Singh on the date i.e. 15-7-2000 when he was apprehended by the police. The possession of the said truck must have been obtained by way of superdari by owner of the truck so as to establish the ownership of Jagtar Singh-accused but no such evidence was led by the prosecution. Thus in the absence of the primary evidence available with the prosecution, they cannot be allowed to lead secondary evidence without the permission of the Court.

In this view of the matter, the prosecution has miserably failed to connect the accused Jagtar Singh as owner of truck No. HR-12-0396. Therefore, his conviction under Section 25 of the Narcotic Drugs and Psychotropic Substances Act is bad in the eye of law.

Learned State counsel however stated that the statements of PW9-ASI Om Parkash and PW10-Binderpal Singla, Insurance Agent are sufficient to prove the ownership of truck No.HR-12-0396 with Jagtar Singh accused.

According to the learned counsel for the appellants that as per the case of the prosecution, accused-Pritam Singh was apprehended at the spot while driving the truck No.HR-12-0396 by the police party in the

area of Village Balian. His truck was searched in the presence of ASP, R.K.Jaiswal and 22 bags of containing poppy husk were recovered from the cabin. Both the samples and the residue were separately sealed and made into parcels and taken into possession vide recovery memo prepared at the spot. The plea of Pritam Singh was that he was not in conscious possession of the contraband. He has not been asked any question under Section 313 of the Code of Criminal Procedure to the effect that he was not in conscious possession of the contraband. Therefore, he has been prejudiced while taking all the defences.

Learned counsel further stated that on his personal search, he was found in possession of Rs.120/-. Therefore, he cannot be termed to be in conscious possession of the articles. In support of his arguments, reference was made to the Full Bench decision of this Court in **Kashmir Singh Vs. State of Punjab** and **Karam Singh Vs. State of Punjab, Criminal Appeals No.407 and 408-DB of 1999** where the Full Bench has dealt in detail with Sections 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act and observed that unless the accused is put in the statement under Section 313 of the Code of Criminal Procedure, that they were in conscious possession of the contraband, the order of conviction and sentence can not be recorded against the accused. It is the fundamental right of the accused to know the case of the prosecution to enable him to develop his defence.

"It has been further observed that in any prosecution for an offence under the Act, which requires a culpable mental state of the accused, the Court shall presume the existence of such mental state but it shall be a defence for the

accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that "prosecution, as provided in Section 35 of the Act. For the purpose of this Section, a fact is said to be proved only when the Court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability."

Section 54 reads as under:-

"Presumption from possession of illicit articles- In trials under the Act, it may be presumed, until and until the contrary is proved, that the accused has committed an offence under this Act in respect of-

(a) any narcotic drug or psychotropic substances or controlled substance;

(b) any opium, cannabis plant or coca plant growing on any land which he cultivated;

(c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or

(d) any material which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been

manufactured, for the possession of which he fails to account satisfactorily."

The learned counsel for the appellants referred to the judgment of the Supreme Court in **Madan Lal and another Vs. State of H.P.** 2003, SCC (Crl.) 1664, wherein it was held as under:-

"The word "possession" means the legal right to possession. The expression "possession" is a polymorphous term which assumes different colours in different contexts. It may carry different meanings in contextually different back grounds. Possession in a given case need not be physical possession but can be constructive, having power and control over the article in the case in question, while the person to whom physical possession is given holds it subject to that power or control."

"The word "conscious" means awareness about a particular fact. It is a state of kind which is deliberate or intended."

"Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption

available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles."

The argument of the learned counsel for the appellants is not tenable because accused-Pritam Singh was apprehended by the police party headed by S.I.Purshotam Singh at the spot as per the statements of the Investigating Officer and other recovery witness, namely, Mr.RK Jaiswal (PW7), the then ASP, Sangrur. S.I.-Purshotam Singh conducted the search of the truck under the directions of ASP-Mr.RK Jaiswal. The truck was covered with tarpaulin. On search of the truck, 22 gunny bags containing poppy husk were recovered from the cabin. Two samples each weighing 250 grams were separated out of each bag and made into parcels. Both residue and the samples were separately sealed and taken into possession by recovery memo duly attested by PWs, who were present at the spot.

Learned counsel stated that the accused has however taken the defence before the trial Court that he was apprehended from Village Ghorenab due to party faction and to prove this fact of innocence of Pritam Singh-accused, the defence has examined DW2-Kartar Singh.

On the other hand, learned Deputy Advocate General, Punjab has submitted that the conscious possession in the instant case is proved because the bags were recovered from the cabin of the truck, which were covered with tarpaulin. The accused was driving the truck at the relevant time. Accused was the only person, who was apprehended by the police party headed by S.I.Purshotam Singh during Nakabandi in the early hours of 15-7-2000 at the spot as per the statement of PW7-Mr.RK Jaiswal,

the then ASP. In support of his arguments, reference was made to **Megh Singh Vs. State of Punjab** (2003) Vol.11 ILD 56(CS) where Hon'ble Supreme Court has dealt in detail that once the conscious possession has been established and by application of logic of Section 54 of the Act when physical possession is established, there is presumption of conscious possession. Whether there was conscious possession or not has to be determined with reference to the factual backdrop. The facts can be culled out from the evidence on record is that the accused was sitting in the truck. It has been defined that word "conscious" means awareness about a particular fact. It is a state of mind which is deliberate or intended to as noted in **Gunwantlal Vs. State of Madhya Pradesh** AIR 1972 SC 1756 that possession in a given case need not be physical possession and can be constructive, having power and control over the article in case in question, while the person whom physical possession is given holds it subject to that power or control.

After hearing the learned counsel for the parties, we are of the view that so far as accused Jagtar Singh is concerned, the arguments raised by the learned counsel for the appellant has force and his conviction appears to be bad in the eye of law in the absence of cogent and convincing evidence brought on the record with respect to ownership of the truck No.HR-12-0396. Therefore, appeal qua Jagtar Singh is accepted. The order of conviction and sentence recorded against accused-Jagtar Singh under Section 25 of the Narcotic Drugs and Psychotropic Substances Act is set aside and he is acquitted of the charges framed against him.

Now, coming to the case of Pritam Singh-accused, we find that the judgment rendered by the Full Bench in **Karam Singh's case**

(supra) is not attracted to the facts of the present case and the judgment rendered by Hon'ble the Supreme Court in **Megh Singh's case** (supra) is fully applicable to the facts and circumstances appearing in the case because accused Pritam Singh was carrying the contraband of poppy husk in the cabin of his truck No.HR-12-0396 while driving the same when he was apprehended by the police party. Entire proceedings at the spot were conducted by the Investigating Officer. In due course of time, sample was sent for analysis and it was found to be poppy husk. Hence, possession and recovery of contraband is fully proved in this case. Thus, we find that the order of conviction recorded by the learned Judge, Special Court, Sangrur appears to be in order and no infirmity could be pointed out by the learned counsel for the appellants. A large quantity of poppy husk recovered from the possession of the accused-Pritam Singh while carrying the same in truck No.HR-12-0396 fully establishes the guilty of accused-Pritam Singh.

We do not inclined to interfere in the order of conviction recorded by the learned Judge, Special Court, Sangrur with respect to accused-Pritam Singh. However, on the quantum of sentence, the period of 12 years is reduced to the period of 10 years without there being any change in the fine.

With these modifications and observations, Criminal Appeal No.438-DB of 2005 filed by Pritam Singh is dismissed and Criminal Appeal No.812-SB of 2005 filed by Jagtar Singh stands allowed.

(R S MADAN)
JUDGE

(K S GAREWAL)
JUDGE

November 06, 2006

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